Supreme Court, U.S.
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No. 93-379

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

JOSHUA VANDERVELDEN
Petitioner

vs

BENJAMIN VICTORIA, M.D.
Respondent

PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT ON PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEALS OF THE STATE OF WISCONSIN

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INTRODUCTION TO PETITIONER'S RESPONSE

Respondent, on both the trial and state appellate levels, urged, based on Roe v. Wade[1], that petitioner had no legal rights as an unborn, in tort or otherwise, against respondent. While the trial court rejected this argument, the state court of appeals upheld it, ruling exactly as respondent argued therein, namely that Roe held petitioner not to be person possessing any legal rights, constitutional or otherwise.

Astonishingly, repondent now argues that there are no federal constitutional issues raised. In discussing state matters, he limits his argument to the battery and state constitutional law matters discussed in the state appellate court.[2]

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1. 410 U.S. 113, 35 L.ed. 2d 147, 93 S. Ct.705(1973)

2. Respondent was silent as to the issue of accomodation being a federal issue giving the Court jurisdiction to grant certiorari. Accomodation, of course, is the central issue presented by the petition.

ARGUMENT

I. THE STATE COURT'S DECISION DID NOT REST ON ANY FAILURE TO PROVE BATTERY, BUT RATHER, ON THE FACT THAT NO CAUSE OF ACTION EXISTS FOR BATTERY IN THE FIRST PLACE, ON BEHALF OF THE UNBORN.

The state court of appeals, beginning its discussion (App. 3a) states clearly why it was reversing:

> "Because the trial court erred in allowing the case to proceed to trial on the basis of a battery claim, we reverse the $1,146,516.88 judgment in favor of Joshua." (Emphasis added)

This statement is pregnant with the conclusion that whether or not a battery was committed was irrelevant, since, even if it were, petitioner had no rights to proceed against the respondent in the first place. The court later explained the issue as one derived from the mother's consent:

> "Whether a physician who performs an unsucessful abortion procedure on a non-viable fetus can be held liable for battery against the unborn fetus where the mother has freely and fully given her consent to the abortion procedure." (App. 7a).

In stating the issue presented before the state court, nothing indicates the issue to be whether a battery was committed in the first place.

Finally, in its concluding remarks (App.13a), the state court said:

> "In conclusion, where a woman has freely consented to an abortion procedure on a non viable fetus, a physician may not be held liable for battery to the unborn fetus."

This statement excludes any supposed failure of proof[3]

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3. Respondent on p. 9, footnote 2 of his response fails to fairly and accurately state petitioner's position as to battery. Respondent there urges that petitioner argues no unlawful contact need be proved as an element of battery. That never has been petitoner's argument. Petitioner's argument always was and still is that unlawful acts need not be shown to establish any intentional tort, including battery, in Wisconsin. As petitioner said on p. 24 of his petition:

> "...Wisconsin law is clear that acts need not be unlawful to be actionable for battery."

This is the essence of the Wisconsin law of battery as applied to physicians. Trogun v. Fruchtman 58 Wis. 2d 569, 207 NW 2d 297(1973). Trogun states, at 207 NW 2d 310:

> "A battery or assault and battery in this state has been defined as an intentional contact with another which is unpermitted."

and cites McCluskey v. Steinhorst, 45 Wis. 2d 350, 357, 173 NW 2d 148(1970) as authority for such rule. Unlawfulness is not a stated element.

of battery as a grounds for reversal. In fact, it assumes for the purposes of the conclusion, that a battery occured and that its occurence was not material to its conclusion. Furthermore, implicit in such conclusion is the fact that the mother was exercising her 1st, 4th, 5th, 9th, and 14th amendment rights in consenting, thereby interweaving the battery ground into the Federal issue.

II. THE STATE CONSTITUTIONAL ISSUE IS NOT AN INDEPENDENT STATE LAW GROUND UPON WHICH TO BASE THE STATE COURT JUDGMENT, AND WAS NO PART OF THE STATE COURT BASES FOR REVERSAL.

A. The state court's state constitutional decision was interwoven with the Roe ruling.

The state court used Roe as the basis why it rejected petitioner's state constituional argument. Its format shows the interweaving and the rejection of the state constitutional argument based on Roe. The state appellate court (App. 11a) pointed out that the trial court's finding that a fetus is a person entitled to redress was based on the state constitution. The state appellate court then rejected that conclusion because of Roe in the language immediately following:

> "As an initial matter, we note the fact that the trial court referred to the nonviable fetus in this case as a "person". We know of no court that has found a fetus of less than 3 months gestational age to be considered as a person entitled to legal protection. This finding runs counter to the United States Supreme Court ruling in Roe v. Wade 410 U.S. 113, 158(1973) ("all this...persuades us that the word 'person' as used in the Fourteenth Ammendment does not include the unborn").

A greater interweaving of state law and federal constitutional law is difficult to imagine.[4,5]

B. The state constitutional issue was not part of the state appellate court's rejection of petitioner's right to sue.

The ruling bases for the state appellate court's reversal of the trial court were set forth in two separate places, one near the start of the opinion (App. 12a-13a);

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4. Interweaving gives the United States Supreme Court jurisdiction. Illinois v. Rodriguez 497 U.S. 177, 110 S. Ct. 2793, 111 L.ed. 2d 148(1990); Milkovich v. Loraine Journal Co. 497 U.S. 1, 110 S. Ct. 2695, 111 L.ed. 2d 1(1990). New York v. Class 475 U.S. 106, 106 S. Ct. 960, 89 L.ed. 2d 81(1986) at 106 S. Ct. 964.

5. See also Perkins v. Benguet Consolidated Mining Co. 342 U.S. 437, 72 S. Ct. 413, 96 L.ed. 485 at p. 491, where the United States Supreme Court has jurisdiction where it appears the state court would have or even might have decided the case differently but for federal law's shadow upon the state law (at bar, the shadow of Roe).

> "Because the trial court erred in allowing the case to proceed to trial on the basis of a battery claim, we reverse..." (App. 3a)
>
> "Where a woman has freely consented to an abortion procedure on a non-viable fetus, a physician may not be held liable for battery to an unborn fetus."

Nothing in said conclusionary comments in the opinion establishes the state constitution as the basis for the holding. Even were there subsumed therein, the state constitutional issue, as pointed out above, said issue was rejected specifically based on Roe. This, as well as the comments in footnote 5 (App. 10a) is illustrative of how Roe was the core and nexus of the state court's reversing opinion.

III. UNDER 28 U.S.C. 1257 (a) THE STATE COURT NEED NOT DENY THE ENFORCEMENT OF A FEDERAL RIGHT TO GIVE THE SUPREME COURT JURISDICTION, BUT ONLY NEED TO RULE ON A RIGHT CLAIMED UNDER THE CONSTITUTION.

Respondent on p. 10-11 of its brief, contends that there must be the denial of a federal right in order for there to

be jurisdiction to review a state court decision. This, however, is not correct. 28 U.S.C. 1257(a) as amended in 1988 provides that a right need merely be "set up or claimed" under the federal constitution in state court proceedings in order for the judgment of said state court to be reviewable by certiorari. In the instant case, the respondent set up and claimed the federal constitutional right of the petitioner's mother to have the abortion as the bases for respondent to avoid liability. See App. 25a-35a and 37a-39a for respondent's state court arguments claiming and setting up such right.

Respondent's assertion that the state court judgment stands purely and solely on state grounds, were it accepted, would mean that any discussion by a state court of state law, irrespective of the federal issues presented, would preclude the Supreme Court from exercising its jurisdiction. This is a erroneous interpretation of the cases cited by petitioner herein and in the petition.

CONCLUSION

The state appellate court misapplied Roe and gave Roe's federal constitutional right an erroneous and overbroad interpretation. This erroneous interpretation gives the United States Supreme Court jurisdiction[6]. The mere possibility that the state court might have reached the same conclusion it did reach had it decided the question purely as a matter of state law does not create an adequate or independent state ground,[7] and the fact that the state court relied to the extent it did on federal grounds brings the merits of the federal issue before the United States Supreme Court.[8]

In Scott v. Sandford 60 U.S. 393, 15 L.ed 691(1857) the Court ruled that blacks were not persons and not entitled to any legal rights. After a long and arduous struggle, blacks succeeded in achieving those rights that are expected in a civilized society. The

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6. Harper v. Virginia Department of Taxation 509 U.S.____ 125 L.ed. 2d 74, 113 S. Ct.___ (June 18, 1993)

7. United Airlines v. Mahin 410 U.S. 623, 35 L.ed. 2d 545, 93 S. Ct. 1186(1973)

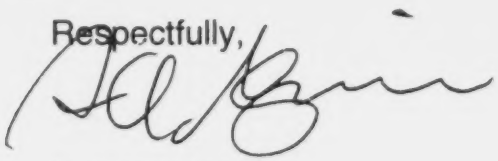
8. Oregon v. Kennedy 456 U.S. 667, 72 L.ed. 2d 416, 102 S. Ct. 2083(1982).

unborn, however, being physically unable to engage in a similar struggle, and lacking standing in the courts to raise their own rights, have had nobody to enforce their would-be rights before this case was presented. The Court should not allow 21st century hindsight to provide the final word upon the correctness of the legal status of the unborn, as 20th century hindsight has rendered judgment on Scott.

It is prayed that the petition be granted and the Court enunciate the latitude and parameters of the rights that states may provide under state law to the unborn.

Oct. 1 1993

Respectfully,



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